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No. 07-1554

IN THE

Supreme Court of the United States

COLUMBIA GAS TRANSMISSION CORPORATION,

Petitioner,

v.

RICHARD A. LEVIN
TAX COMMISSIONER OF OHIO,

Respondent.

On Petition for a Writ of Certiorari to the Ohio Supreme Court

BRIEF OF SPECTRA ENERGY CORP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

Spectra Energy Corp ("Spectra") is a Delaware corporation with its headquarters in Houston, Texas.

[1] Counsel of record for both parties received timely notice of the intention of *amicus curiae* to file this brief and both parties consented to the filing through blanket consents on file with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

Spectra is one of North America's leading natural gas infrastructure companies. It is engaged through various subsidiaries and equity affiliates in the transmission, storage, distribution, gathering and processing of natural gas. Prior to 2007, Spectra was a unit of Duke Energy Corporation.

Spectra's United States pipeline system consists of more than 13,500 miles of transmission pipelines, with five primary transmission systems. One of its systems is Texas Eastern Transmission, LP ("Texas Eastern"). The Texas Eastern system has close to 9,000 miles of pipeline connecting Texas and the Gulf Coast with the northeastern United States. A significant portion of the Texas Eastern system runs through Ohio, where Texas Eastern transports gas from the Gulf Region to industrial users, power plants, municipalities and other customers in that State. In providing that service, Texas Eastern is in direct competition with local distribution companies ("LDCs"), which are public utilities based in Ohio and which, since 1997, have been authorized by the State to sell their own gas transportation service as an "unbundled" service to any and all local and out-of-state producers and marketers seeking to have gas delivered to customers in Ohio.

Spectra's Texas Eastern pipeline property is subject to Ohio personal property tax at 88 percent of the property's true value, while the LDCs' pipeline property is subject to tax at 25 percent of true value. Spectra's operations in Ohio will be directly affected by the outcome of the instant case.

SUMMARY OF ARGUMENT

Following Ohio's deregulation of the natural gas industry beginning in 1997, LDCs were authorized for the first time to provide gas transportation, storage and gathering services to customers in direct competition with interstate pipeline companies doing business in the State. In addition, the LDCs lost their monopoly power over the local residential customer market for "bundled" gas purchases, as residents were allowed to purchase "unbundled" gas from any in-state or out-of-state supplier. LDCs thus now compete in the Ohio natural gas market in many ways not previously contemplated.

Notwithstanding these changes in the industry, the court below refused to find a constitutional violation in the State's taxing scheme for pipeline property used to transport natural gas, which provides a substantial benefit to the LDCs. The court concluded that the rationale of this Court's decision in *General Motors Corp.* v. *Tracy*, 519 U.S. 273 (1997), justified a conclusion that the LDCs and the interstate pipeline companies were not "substantially similar" enterprises for purposes of testing the constitutionality of the differential taxation in question. What the court below overlooked was that Ohio's actions in deregulating the natural gas industry after the decision in *GM* v. *Tracy* not only completely altered the marketplace but also the very foundation upon which this Court's decision had rested.

Because the LDCs no longer sell "bundled" gas to a "captive" residential market, a role that this

Court saw as their primary mission at the time *GM* v. *Tracy* was considered, the LDCs have lost the cloak that shielded them from claims of unconstitutional protectionism. Instead, for dormant Commerce Clause purposes, deregulation has necessarily caused the LDCs to become "substantially similar" to all other participants in the markets in which they now compete. Accordingly, allowing the LDCs to enjoy a significantly reduced tax burden on their personal property while taxing the property of their interstate pipeline competitors much more heavily represents impermissible economic protectionism.

This Court should review the instant case to reinforce its long line of precedent establishing that the dormant Commerce Clause does not condone a State taxing scheme that so blatantly favors local interests over out-of-state interests competing in the same marketplace. Additionally, this Court should review the decision below to provide very clear guidance to the States on what types of protectionist measures do not pass constitutional muster in the context of an industry moving from regulation to deregulation.

ARGUMENT

The instant case raises an important and quite fundamental constitutional question – under what circumstances will a state's deregulation of a public utility industry cause previously dissimilar enterprises to become "substantially similar" for purposes of testing impermissible discrimination against out-of-state participants in the deregulated marketplace.

In *GM* v. *Tracy*, this Court considered a challenge to the sales/use tax exemption that Ohio allowed for sales of natural gas by LDCs, but not for sales by out-of-state producers or marketers. This Court held that the differential tax treatment accorded such sales did not constitute impermissible discrimination against the out-of-state sellers in violation of the dormant Commerce Clause. The basis for that decision was that the LDCs and the out-of-state sellers were not "substantially similar" enterprises, as required to permit a valid comparison for purposes of testing a claim of unconstitutional discrimination. 519 U.S. at 298-300. Following its decision in *GM* v. *Tracy*, this Court has continued to recognize the principle that "any notion of discrimination assumes a comparison of substantially similar entities." *United Haulers Ass'n, Inc.* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1795 (Apr. 30, 2007).

The underlying rationale for distinguishing LDCs from out-of-state sellers in *GM* v. *Tracy* was that, under the then-existing Ohio regulatory framework, the primary role of the LDCs was to sell "bundled" gas to a "captive" market of local residential customers. During the tax periods at issue, the transportation of gas to residential customers was a service embedded in the charge for the gas. In addition, the LDCs had certain other obligations and responsibilities to residential customers that were imposed on them in exchange for the monopoly privilege they were granted. The LDCs were also authorized to sell "unbundled" gas to industrial and commercial users in Ohio, where they competed with out-of-state producers and marketers seeking to sell to the same customers. This Court

viewed the "unbundled" sales activity of the LDCs as merely a supplement to their primary activity, which was to sell "bundled" gas in the "captive" residential market. Since the out-of-state sellers did not compete in the captive residential market, there was not sufficient competition between the two selling groups to support a determination of impermissible discrimination in Ohio's taxing scheme.

This Court went on to note that the Ohio statutes contained numerous other differences in tax treatment affecting the various market participants (LDCs, pipelines, producers and marketers) active in the State. *GM* v. *Tracy*, 519 U.S. at 307, 308. For example, at that time LDCs paid personal property tax on 88 percent of true value, while nonregulated gas marketers paid personal property tax on 25 percent of true value. *Id.* at 308 n.16. This Court anticipated that future challenges to such differential treatment would be forthcoming. *Id.* What this Court may not have anticipated was that Ohio would dramatically change its regulatory framework almost contemporaneously with this Court's decision in *GM* v. *Tracy*.

As a result of Ohio's actions in deregulating the natural gas business, LDCs have been free to engage, in an "unbundled" manner, in the business of transporting natural gas within the State. LDCs with adequate pipeline capacity of their own now offer a wholly separate gas transportation service to both in-state and out-of-state producers and marketers seeking to have their gas delivered to customers in Ohio. LDCs are also free to sell unbundled natural gas storage and gathering services. In offering all of these services, the LDCs

now compete head-to-head with the interstate pipeline companies, including petitioner and Spectra, that offer the same services to Ohio customers.

While the LDCs continue to sell gas to local residential customers, deregulation introduced "customer choice" in Ohio. Residential customers are now free to select among various gas suppliers. Delivery of the gas they purchase is now provided as a separate "unbundled" service by the customer's LDC. Thus, while the LDCs as a group still have a captive *distribution* market (because the interstate pipelines have not attempted to deliver gas to local residential customers), the LDCs no longer have a captive *sales* market for their gas. Residential customers can choose to purchase their gas from a different in-state or out-of-state supplier and arrange for their LDC merely to deliver the gas.

Ohio's deregulation of the natural gas industry has completely altered the marketplace and, as a result, the foundation upon which *GM* v. *Tracy* rested. Although the LDCs continue to have certain obligations to support the local residential market in various worst-case scenarios, they no longer have as their primary mission the sale of "bundled" gas to a "captive" local market. They now compete with other suppliers for local residential sales as well as for industrial and commercial sales.

Given these changes, there is no basis for concluding, as did the court below, that the mere continuation of sales of gas by LDCs into the local residential market, now on a competitive, unbundled basis under a "customer choice" regime, should serve

to immunize from constitutional challenge any preferential benefits that have been accorded the LDCs in the deregulated environment. The rationale that led to the result reached in *GM* v. *Tracy* should not control the outcome here because the activities of the LDCs in the marketplace have completely changed.

As this Court made clear in *GM* v. *Tracy*, the role of the dormant Commerce Clause is to protect markets and participants in markets. 519 U.S. at 300. The LDCs and the interstate pipeline companies now compete directly in the market for providing gas transportation services and certain other services in Ohio. Deregulation of the natural gas industry in Ohio has thus produced "substantial similarity" between the LDCs and the interstate pipeline companies with respect to the offering of such services. Indeed, the Ohio regulators have endeavored to create what is, from a non-tax perspective, essentially a level playing field for the provision of such services.

In the course of deregulating the LDCs, however, Ohio also saw fit to provide them with a generous tax break. Effective with the tax year 2001, Ohio reduced the assessment ratio on LDC personal property (including pipelines and related equipment) from 88 percent of true value to 25 percent of true value. At the same time, it left the assessment ratio for the personal property of the pipeline companies at 88 percent of true value. As a result, the property of the interstate pipeline companies is now taxed more than three times as heavily as the property of the LDCs. This directly affects the competitiveness of the interstate

pipelines as they offer their services to Ohio customers.

Ohio's action in reducing the tax assessment ratio for LDC pipeline property, while leaving the interstate pipeline property tax ratio intact, represents a blatant form of economic protectionism that runs directly afoul of the dormant Commerce Clause. The State's action is equivalent to the imposition of an entry fee on interstate pipelines equal to the tax on 63 percent (*i.e.*, the difference between 88 percent and 25 percent) of the true value of their Ohio-based property. It is hard to imagine a more obvious form of intentional and facial discrimination that burdens interstate commerce in favor of purely local interests. *New Energy Co.* v. *Limbach*, 486 U.S. 269 (1988); *Chemical Waste Mgmt., Inc.* v. *Hunt*, 504 U.S 334 (1992); *Camps Newfound/Owatonna* v. *Town of Harrison*, 520 U.S. 564 (1997).

As noted above, the deregulation fostered by Ohio necessarily produces "substantial similarity" between the LDCs and the interstate pipeline companies with respect to the offering of gas transportation, storage and gathering services. The decision of the court below is thus in direct conflict with numerous decisions of this Court that have invalidated taxing schemes favoring local interests over competing out-of-state interests. *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984); *New Energy Co.* v. *Limbach*, 486 U.S. 269 (1988). This Court should review the instant case to make it clear to lower courts that a State's shift from regulation to deregulation of an industry such as the natural gas industry provides a natural environment in which

newly-emerging competitors can be found to satisfy the "substantially similar" requirement that supports a discrimination challenge.

This Court should also review the decision below to establish the permissible limits for a State's use of its regulatory apron strings to shield the granting of economic benefits to local interests as part of the deregulation process, to the detriment of interstate competitors participating in the marketplace. Without further guidance from this Court, States will assume they are free to continue enacting protectionist measures that favor local market participants, notwithstanding a stated goal of free and open competition with out-of-state interests.

This Court's review of the decision below is particularly important at this time, in light of the increasing trend toward the deregulation of public utility services across the country.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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